STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2001
v	No. 222152 Wayne Circuit Court
DAMON LAMAR MURRY, Defendant-Appellant.	LC No. 98-013811

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant to one to four years' imprisonment for the possession of less than twenty-five grams of cocaine conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court abused its discretion by denying defendant's request for an adjournment in order to obtain substitute counsel. We disagree. The grant or denial of an adjournment is reviewed for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). Additionally, a trial court's decision regarding substitution of appointed counsel will not be disturbed absent an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

Addressing the substitution of counsel, this Court has explained:

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not

[1] Defendant was charged with possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and felony-firearm, MCL 750.227b.

> unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*Id.*, citing *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991) (citations omitted in original).]

Based on the record, the trial court did not abuse its discretion. Defendant never requested an adjournment to obtain substitute counsel; rather, defendant requested an adjournment to locate witnesses. In fact, defendant never actually asked for substitute counsel. Defendant testified that he had been in contact with another attorney but that they had no formal agreement. Moreover, defendant acquiesced, on the record, to defense counsel's representation. Therefore, the trial court did not interfere with defendant's right to counsel and a new trial on this basis is unwarranted.

Defendant next claims that the prosecutor improperly argued that defense counsel was trying to mislead the jury. We disagree. Allegations of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Allegations of prosecutorial misconduct are decided on a case by case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine if the defendant was denied a fair and impartial trial. *Id.*; *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Bahoda*, 448 Mich 261, 267, n 7; 531 NW2d 659 (1995). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

In the context of defense counsel's closing argument, the prosecution did not indicate that defense counsel was trying to mislead the jury. The prosecution merely argued, based on defense counsel's closing argument, that the defense presented several reasons for finding defendant not guilty. The prosecutor specifically indicated that he was not suggesting that defense counsel was trying to confuse them, but was drawing their attention to several different facts. Additionally, the trial court instructed the jury that, "The lawyers' statement[s] and arguments are not evidence. They are only meant to help you understand the testimony and each side's legal theories." The instruction that arguments of counsel are not evidence is sufficient to cure any possible error in this case. *People v Hall*, 396 Mich 650, 656-657; 242 NW2d 377 (1976).

In his last argument, defendant asserts that he was denied the effective assistance of counsel. We disagree. A claim of ineffective assistance of counsel raises a constitutional issue, which this Court reviews de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). Because defendant did not request a Ginther[2] hearing or move for a new trial, this Court's review of defendant's claim of ineffective assistance is limited to errors apparent on the

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

record. *Snider, supra* at 423. An unpreserved constitutional error only warrants reversal when it was a plain error that affected a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764, 773-774; 597 NW2d 130 (1999).

To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defense counsel's performance must be measured against an objective standard of reasonableness. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant first argues that defense counsel failed to move to suppress defendant's statement as involuntary. The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession was freely made. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). However, defendant presented no evidence in the lower court to support this assertion. On appeal, defendant only cites to defense counsel's opening statement and closing argument, which may not be considered as evidence. Conversely, the prosecution presented testimony of Officer Ruffin that he did not threaten defendant or use aggression with him. Without evidence to support the assertion that defendant's statement was involuntary, there is no basis for finding that defense counsel was ineffective in failing to move to suppress the statement.

Defendant next argues that defense counsel failed to challenge the search of defendant as invalid because it went beyond the scope of the search warrant. The United States Constitution and the Michigan Constitution guarantee the right of the people to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. A warrantless search is generally unreasonable absent probable cause and a circumstance establishing an exception to the warrant requirement. *Snider, supra* at 407. However, a warrant to search a specified place does not authorize a search of the people found there. *People v Burbank*, 137 Mich App 266, 270-271; 358 NW2d 348 (1984), citing *Ybarra v Illinois*, 444 US 85, 91-92; 100 S Ct 338; 62 L Ed 2d 238 (1979).[3]

Nonetheless, "police officers may make a valid investigatory stop if they possess 'reasonable suspicion' that crime is afoot." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996), citing *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). A limited patdown search for weapons may be performed by an officer who makes a valid investigatory

[3] Defendant cites both *Ybarra, supra* and *Burbank, supra*. However, these cases are distinguishable from this case in that they both involved defendants who did not appear to possess weapons. *Ybarra, supra; Burbank, supra.* In this case, defendant was sitting on top of a rifle, the end of which extended out from under him and was clearly visible to the officers.

stop, if the officer has reasonable suspicion to believe that the individual stopped for questioning is armed and poses a danger to the officer. *Id*. at 99. Furthermore, the plain feel exception to the warrant requirement allows the seizure of an object felt during a legitimate patdown search for weapons when the identity of the object is immediately apparent and the officer has probable cause, based on the totality of the circumstances, to believe that it is contraband. *Id.* at 105-106, 112-113. Probable cause does not require certainty, but only a probability or substantial chance of criminal activity. *Id.* at 111, n 11.

In this case, the police officers executed a valid search warrant for the lower left apartment of 2018 North in Detroit. Upon entering the apartment, Officer Thornton saw defendant sitting on a couch with what appeared to be a rifle underneath him. Upon the advice of Officer Thornton, Officer Ruffin detained defendant. Because defendant was seen sitting on what appeared to be a rifle, the investigatory stop was valid. When defendant stood up, Officer Thornton saw a sawed-off shotgun where defendant had been sitting. At this point, Officer Ruffin conducted a patdown search for other weapons. Because defendant was sitting on a shotgun, Officer Ruffin had a reasonable suspicion to believe that defendant was armed. During the patdown, Officer Ruffin discovered a plastic bag containing sixteen Ziplocs of a white lumpy substance in defendant's right front pants pocket.[4] Officer Ruffin knew of drug activity in the area and, specifically, in front of this house. Officer Ruffin testified that the police had been to the house several times before and that the apartment appeared vacant due to the lack of water and electricity. Further, Officer Ruffin knew from experience how narcotics were packaged for delivery and that drug sellers usually carried guns. Given the totality of the circumstances, the officer, upon feeling the plastic bag, had probable cause to believe that it contained contraband. Because the evidence was properly admitted, there is no basis for defendant's argument that defense counsel was ineffective for failing to challenge the search or in not moving to suppress the evidence.

Defendant next argues that defense counsel failed to admit the search warrant into evidence. Decisions regarding what evidence to present is presumed to be a matter of trial strategy for which this Court will not substitute its judgment. *Garza, supra* at 255. Defendant purports that the description of the man in the search warrant did not match defendant's appearance as admitted by Officer Thornton at trial. Defense counsel mentioned this in closing argument and during cross-examination. Because the discrepancy between the description in the warrant and defendant's appearance was elicited during the cross-examination of Officer Thornton, defense counsel's failure to admit the warrant into evidence did not fall below objective standards of reasonableness. Moreover, admission of the warrant into evidence would probably not have changed the outcome of the case. The police performed a valid patdown and, upon probable cause, seized the Ziplocs of cocaine from defendant's pants. The fact that the warrant failed to describe defendant did not render the search and seizure invalid. Therefore, the evidence found on defendant was properly admitted.

Defendant further claims that defense counsel mistakenly informed the jury that it had to find defendant guilty of the principal charge in order to find him guilty of the felony-firearm charge. While this argument was erroneous, it is not apparent, based on the entire record, that it

[4] The substance was later tested and determined to be cocaine.

changed the outcome of the case. Both the prosecutor and the trial judge subsequently set forth the correct law regarding felony-firearm. Additionally, the trial court provided an adequate instruction to dispel jury confusion: "It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, following [sic] what I say." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, defendant argues that defense counsel failed to challenge the trial court's sentencing of defendant based on the fact that it erroneously relied upon defendant's juvenile offense that was listed in the adult offenses of the presentence investigation report. Use of inaccurate information at sentencing may violate the defendant's constitutional right to due process. *People v Hoyt*, 185 Mich App 531, 533-534; 462 NW2d 793 (1990). At sentencing, either party may challenge the accuracy or relevancy of the information contained in the presentence report. *Id.* The presentence report is presumed to be accurate, but upon assertion of a challenge to the factual accuracy of information, a court has a duty to resolve the challenge. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). The record indicates that defense counsel reviewed the presentence report with defendant and found the report to be accurate.

On appeal, defendant points out that he was a juvenile in 1991 and that the presentence report lists an adult charge of carrying a concealed weapon on March 7, 1991.[5] However, it appears that the listing of the March 7, 1991 charge as an adult charge is due to the fact that the sentence and discharge dates are in 1993, at which time defendant was an adult.

Nonetheless, there is no indication that the trial court erroneously relied on defendant's juvenile record in sentencing him. Defendant's adult offenses include two alcohol related violations, one carrying a concealed weapon conviction (1995), and a charge for delivery of less than fifty grams of cocaine which resulted in a plea bargain. Based on the adult offenses, other than the one contested on appeal, the trial court correctly considered the fact that defendant had a prior record involving guns and drugs. Additionally, the Basic Information Report indicates that defendant had one prior felony conviction which is consistent with the correct number of adult offenses listed. The prior record score on the sentencing information report only lists one prior low severity conviction and indicates that defendant was either incarcerated or awaiting adjudication or sentencing on a conviction or probation violation. This is consistent with the adult report which shows defendant's 1995 carrying a concealed weapon conviction and probation violation. Because defense counsel reviewed the presentence report with defendant and found it to be accurate, representation did not fall below objective standards of

[5] Defendant's birth date is August 1, 1974.

reasonableness. We further find that because the trial court did not rely on defendant's juvenile offenses in sentencing him, the alleged inaccuracy did not affect the outcome of defendant's case.

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper